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No. 419

In the Supreme Court of the United States

OCTOBER TERM, 1940

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

MARY M. HUTCHESON

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 11–12) is reported at 40 B. T. A. 27. The opinion of the Circuit Court of Appeals for the Fifth Circuit (R. 21–23) is reported at 111 F. (2d) 229.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Fifth Circuit was entered April 13, 1940 (R. 24). On July 9, 1940, an order was signed by

a Justice of this Court extending to September 11, 1940, the time within which to apply for a writ of certiorari (R. 27). The petition for a writ of certiorari was filed September 11, 1940, and was granted October 28, 1940. The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether under Section 504 (b) of the Revenue Act of 1932 the donor of a gift in trust is entitled to one $5,000 exclusion for the entire trust or to a separate $5,000 exclusion for each of the beneficiaries of the trust.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Revenue Acts of 1932 and 1938 and of the Treasury regulations promulgated thereunder are set out in the Appendix to the brief for the United States in *United States* v. *Pelzer,* No. 393, this Term, to be argued herewith.

STATEMENT

The findings of the Board of Tax Appeals are in substance as follows (R. 9–10):

On December 30, 1935, the taxpayer executed an indenture of trust and transferred to the trustees personal and real properties of a value of $144,970.34. The trust instrument provided that the trustees were to hold the property in trust for the use and benefit of the taxpayer's seven children.

In their discretion the trustees could hold and accumulate the entire net income of the trust corpus, or distribute it among the beneficiaries, who were to share and share alike in all distributions and payments of either principal or income. In the event of the death of a beneficiary prior to the termination of the trust, his or her interest was to go to the person or persons designated in the will of the deceased beneficiary, and in default of appointment to the deceased beneficiary's heirs at law as determined by the law of Texas (R. 9–10).

Paragraph six of the trust agreement provides (R. 10):

> Neither the principal nor the income of the trust shall ever be liable for the debts of any beneficiary hereunder, nor shall the same be subject to seizure by any creditor of any such beneficiary under any writ or proceeding at law or in equity, and no such beneficiary shall have power to sell, assign, transfer, convey, encumber, or in any other manner dispose of or anticipate the disposition of his or her interest in the trust property, or the income to be produced thereby, or any divisions or distributions thereof.

The trust was to terminate March 1, 1957, unless sooner terminated by final division and distribution of the trust property. Upon termination of the trust the corpus was to be paid over to the then beneficiaries according to their respective interests. The trust instrument provided that the grantor (the taxpayer) should have no power to revoke the

trust nor to revest in herself any part of the principal or income. (R. 10.)

In auditing the taxpayer's return for 1935 the Commissioner allowed a specific exemption of $50,000 and one exclusion of $5,000, in lieu of seven $5,000 exclusions claimed by the taxpayer (R. 6). The Commissioner explained that—"Inasmuch as the trust to which the gifts were made is considered to be one donee, only one exclusion therefor may be allowed" (R. 7). On this issue the Commissioner proposed a gift tax deficiency of $2,981.05. The Board of Tax Appeals approved the determination of the Commissioner. The Circuit Court of Appeals for the Fifth Circuit reversed, holding that the taxpayer was entitled to a separate $5,000 exclusion for each of the seven beneficiaries of the trust (R. 21–24).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals for the Fifth Circuit erred:

In holding that under Section 504 (b) of the Revenue Act of 1932 the taxpayer was entitled to an exclusion of $5,000 for each beneficiary of the trust in the computation of the net amount of the gift in trust subject to tax.

ARGUMENT

The question presented in this case is the same as the first of the two questions presented in *United States* v. *Arthur Pelzer,* No. 393, this Term, to be argued herewith. Hence we adopt for this case

the brief on behalf of the United States in the *Pelzer* case.

In addition to what is said in the *Pelzer* brief, we believe that the trust instrument in this case illustrates the advisability of considering the trust as the donee. As pointed out in the *Pelzer* brief, the donees are secondarily liable for the gift tax to the extent of the value of the property received by them. Here, under paragraph 6 of the trust instrument, *supra*, p. 3, neither the principal nor the income of the trust may be liable for the debts of the beneficiaries, and none of the beneficiaries has any power to sell, assign, or encumber his or her interests in the trust property or income. Hence it would be desirable to hold the trust, rather than the beneficiaries, liable for the tax.

CONCLUSION

For the reasons stated in the brief for the United States in the *Pelzer* case, it is submitted that the decision of the court below is erroneous and that it should be reversed.

Respectfully submitted.

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